No. 80-323

In the Supreme Court of the United States

OCTOBER TERM, 1980

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to prove that respondents' blanket licenses covering non-dramatic performance rights to pools of copyrighted music restrain trade in violation of Section 1 of the Sherman Act.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Since 1914, respondent American Society of Composers, Authors and Publishers (ASCAP) has acquired licensing rights from its author and composer members and has issued "blanket licenses" to various users. Similarly, respondent Broadcast Music, Inc. (BMI), which was formed by radio broadcasters in 1939 and remains broadcaster owned, also issues blanket licenses covering its entire musical repertory. Virtually each of the more than 4,000,000 domestic copyrighted musical compositions is in either ASCAP's or BMI's repertory. Respondents' blanket licenses, which usually are in effect for a one-year period, permit the licensee to use each and every composition within the repertory as often as desired for a fixed fee or for a percentage of the licensee's revenues. Neither ASCAP nor BMI directly grants licensees the option of obtaining performing rights on a per use, per composition basis. See Pet. App. E-2 to E-6.

The licensing activities of ASCAP and BMI are regulated by consent decrees dating back to 1941 (Pet. App. E-6). As modified by a 1950 amended decree (*United States* v. *ASCAP*, [1950-1951] Trade Cas. (CCH) para. 62,595 (S.D.N.Y. 1950)), ASCAP is required to "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Para. VI). At the same time, members retain the right to license their works individually (Para. IV(B)). The decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the copyright owner cannot be located within 30 days (Para. VI).

The decree permits ASCAP and licensees to negotiate any fee and any form of blanket license on which they can agree. It provides, however, that ASCAP must offer at least a "per program" blanket license,[1] the fee for which is based on income received for programs in which ASCAP music is played (Para. VII(B)). ASCAP must offer a "genuine economic choice" between per program and other licenses, and it is restrained from "requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license" (Para. VII(B)(3), (C)). If the parties are unable to agree on a mutually acceptable fee, the applicant may petition the United States District Court for the Southern District of New York for determination of a reasonable fee (Para. IX(A)). In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (*ibid.*).

Like the ASCAP consent decree, the consent decree entered in *United States* v. *Broadcast Music, Inc.*, [1966] Trade Cas. (CCH) para. 71,941 (S.D.N.Y. 1966), requires BMI to offer alternative forms of fee arrangements for blanket licenses (Para. VIII(B)). While other provisions of the decree differ from those in the ASCAP decree, the parties stipulated that petitioner could license directly from BMI affiliates with the same ease or difficulty as from ASCAP members (Pet. App. E-9 to E-10).

Since 1946, petitioner and the other television networks have negotiated blanket licenses with ASCAP and BMI (Pet. App. E-6, E-11, E-28). The fees under these licenses have been based on a percentage of the networks' total revenues and do not depend on the amount or distribution of music use (*id.* at E-6, E-11). Until this suit was filed in

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[1] A "per program" blanket license enables the licensee to use any or all compositions in the repertory, as often as desired, for specified programs of the licensee (Pet. App. E-6 to E-7).

December 1969, CBS never had sought any other form of license from ASCAP, BMI, or their members (*id.* at E-27 to E-28).

2. In 1969, following unsuccessful negotiations regarding a renewed blanket license, petitioner filed this private antitrust action against respondents in the United States District Court for the Southern District of New York. Petitioner claimed that respondents' blanket licensing system, which is not based on actual use of specific compositions, violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, because it "compels" petitioner to pay royalties that are not based on actual music use. Petitioner principally contended that the blanket license is, in effect, an unlawful tying arrangement requiring petitioner to purchase the right to play music that it does not want in order to obtain the right to play music that it does want (Pet. App. E-10 to E-12). Critical to petitioner's tie-in theory was its alleged inability to obtain the music that it wanted (the tying product) from individual copyright owners (*id.* at E-11 to E-12). Petitioner further claimed that the pooling of license rights and the issuance of blanket licenses constitute price-fixing, a joint refusal to deal, and monopolization, in violation of Sections 1 and 2 of the Sherman Act, as well as copyright misuse (Pet. App. E-11).

Following an eight-week trial, the district court concluded that respondents' licensing activities do not violate the antitrust or copyright laws, and it dismissed petitioner's complaint in its entirety (Pet. App. E-1 to E-98). The court first held that respondents' licensing arrangement does not constitute a *per se* violation of the antitrust laws because respondents' licensing authority is not exclusive. The court noted that, under the consent decree, the district court retains the ultimate power to set a reasonable fee for respondents' blanket licenses (*id.* at E-13 to E-21). With regard to the rule of reason and the copyright misuse claims,

the district court viewed the dispositive question as one of compulsion: whether petitioner is coerced as a practical economic matter into taking a blanket license. The court found that petitioner had failed to prove the nonavailability of alternatives to the blanket license and that, in fact, individual copyright owners "would wait at [petitioner's] door [to deal directly with it] if it announced plans to drop its blanket license" (Pet. App. E-89; see *id.* at E-15 to E-16, E-56 to E-92).

3. The court of appeals affirmed the dismissal of all antitrust claims except one (Pet. App. D-1 to D-23). The court observed that, although the availability of individual licenses defeats petitioner's tie-in claim, it does not dispose of petitioner's price-fixing allegations (*id.* at D-8 to D-11). The court concluded that respondents are engaged in price-fixing, a *per se* violation of Section 1 of the Sherman Act, because the copyright owner's distributive share of the common royalties from respondents' licenses is not equal to the payment the owner would receive in a free market. Rather, the copyright owner's share is the result of at least a threshold elimination of price competition for the performing rights to the owner's musical composition (*id.* at D-11 to D-12). The court further stated, however, that "the blanket license need not be prohibited in all circumstances," since the record did not "compel a finding that the blanket license does not serve a market need for those who * * * deem [it] desirable" (*id.* at D-21 to D-22). Accordingly, the court of appeals remanded the case to the district court to fashion an appropriate remedy including both a blanket and a per use license (*id.* at D-21 to D-23).[2]

4. Thereafter, this Court granted respondents' petitions for a writ of certiorari to review the judgment of the court of

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[2]Judge Moore concurred in the result but stated that he did not believe that respondents' licensing constituted price-fixing (Pet. App. D-23).

appeals (439 U.S. 817 (1978)), and rejected the court of appeals' *per se* analysis (441 U.S. 1(1979), reprinted at Pet. App. C-1 to C-39). The Court first observed that respondents' licensing practices are *sui generis* and are subject to prior consent orders and continuing judicial and Department of Justice supervision (*id.* at C-6 to C-16). Viewed in this context, the Court found that "[t]he blanket license * * * is not a 'naked restrain[t] of trade with no purpose except stifling of competition,' * * * but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use" (*id.* at C-20; citation omitted). The Court also concluded that the blanket license is a separate product, different from the license that any individual copyright owner can offer. That distinct product, the Court explained, serves the needs of both users and copyright owners, and by necessity must be marketed through an organization such as ASCAP or BMI, which necessarily has authority to negotiate a price regarding the blanket license (*id.* at C-20 to C-24). Because the blanket license is thus not "plainly anticompetitive" (*National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978)), the Court remanded the case to the court of appeals for an assessment under the rule of reason of repondents' licensing scheme in the context of the television industry (Pet. App. C-25 to C-26).[3]

5. On remand, the court of appeals held that it need not engage in an extensive rule of reason analysis because the trial court's original "findings of fact demonstrate that the blanket license has no anticompetitive effect at all" (Pet. App. A-8).[4] Although acknowledging that there is no price

[3]Justice Stevens dissented from the remand, concluding that the "exclusive all-or-nothing blanket-license policy violates the rule of reason" (Pet. App. C-26).

[4]The court of appeals concluded that this line of analysis had been left open by this Court's decision and remand order (Pet. App. A-9 to A-10).

competition with respect to different songs (*id.* at A-10), the court of appeals concluded that this market characteristic is attributable to the apparent preference of users for blanket licenses in lieu of purchases of performing rights from individual copyright owners (Pet. App. A-10 to A-11). The court agreed with petitioner that "the blanket license cannot possibly be saved from illegality under § 1 simply because [petitioner] has the alternative of hiring composers to fill its needs for music * * * [and that a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition" (*id.* at A-12). The court nonetheless held that petitioner was free to buy performing rights from copyright owners but had chosen not to do so, and that, since "copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade" (*ibid.*).

Reviewing the proceedings in the district court, the court of appeals noted that the trial "concerned primarily the issue of whether direct licensing was feasible" (Pet. App. A-14). The court of appeals noted that the district court had found that there were feasible alternatives to the blanket license, and it held that "[t]hat ultimate finding is abundantly supported by subsidiary findings and by the record, which completely refute all of [petitioner's] allegations of barriers to direct licensing" (*ibid.*). In particular, the court of appeals found that the time and expense necessary to establish procedures to engage in wholesale direct licensing were not substantial barriers about which petitioner could complain (*id.* at A-14 to A-16). The court also concluded that petitioner had failed to prove that individual copyright owners would be disinclined to deal with it or would be likely to demand unconscionably high fees (*id.* at A-16 to A-17). Finally, the court of appeals noted that petitioner

can renew its blanket license if that device proves to be preferable to individual negotiations (*id.* at A-17 to A-19).

DISCUSSION

The court of appeals has held that respondents' blanket licensing scheme has no anticompetitive effect because petitioner could readily seek to deal directly with individual copyright owners. Although we believe that the court of appeals' rule of reason analysis was too narrow, its decision appears to be predicated on the unique facts and procedural background of this case and does not establish any rule of general applicability.[5] Moreover, the decision below does not preclude future judicial supervision of respondents' licensing practices. Accordingly, further review by this Court is unwarranted.[6]

1. The court of appeals' conclusion that the blanket license has no anticompetitive effect rests on the district court's finding that petitioner was not economically compelled to negotiate for a blanket license. To be sure, that finding refutes petitioner's claim that the blanket license is an unlawful tying arrangement. But it does not necessarily

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[5]This Court's prior decision in this case established that the rule of reason, rather than a *per se* rule, is applicable (Pet. App. C-1 to C-39). Decisions of this Court also have prescribed the mode of analysis to be followed in rule of reason cases. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918). The court of appeals recognized that these decisions required it to determine whether the agreement here in question "is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweight its pro-competitive effects." Pet. App. A-8. At bottom, then, the question in this case is whether the court of appeals erred in applying settled legal principles to the facts of this particular case.

[6]The United States has not attempted to review the entire district court record in this case. Our characterization of the evidence and proceedings below is based solely on the opinions in this case.

follow that the existence of economic alternatives demonstrates that respondents' licensing scheme has no anticompetitive effect. Thus, even if individual copyright owners are willing to deal with petitioner, it is quite possible that the existing blanket license renders such negotiations more difficult or more costly, and that, as a result, respondents are able to charge a non-competitive fee for their licenses. Moreover, as we informed the court of appeals (Pet. App. H-15 to H-20), the undisputed facts in this case strongly suggest that the relevant market reflects substantial deviations from the competitive norm. See also *id.* at C-26 to C-39 (Stevens, J., dissenting).[7] Hence, the court of appeals should have examined the relationship between these conditions and the challenged blanket licensing scheme and weighed the procompetitive aspects of respondents' licensing scheme against its apparent anticompetitive effects. See, *e.g.*, *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).[8]

We note, however, that the court of appeals' unduly narrow focus on the issue of economic compulsion appears to be attributable to petitioner's initial litigation strategy. In the district court, petitioner primarily relied on a tie-in theory that required it to prove that it was compelled to take the tied product (the unwanted music) in order to obtain the

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[7]For example, there is no price competition among musical composers producing similar compositions, even though some composers are obviously more popular than others. Indeed, there is no existing market at all for individual performing rights. In addition, the fact that the fee for a blanket license is based on a percentage of network advertising revenues means that respondents are able to charge the more successful networks more money for the same product. Persistent price discrimination of this kind may indicate the presence of the market power of a cartel.

[8]In the court of appeals, the United States suggested that it might be appropriate to remand the case to the district court for further examination of these issues (Pet. App. H-25).

tying product (the desired music). See generally L. Sullivan, *Handbook of the Law of Antitrust* § 156 (1977). Accordingly, respondents' defense and the trial as a whole focused on the issue of compulsion rather than the other issues ordinarily addressed in a rule of reason case. And in the court of appeals' view, petitioner simply failed to establish its primary contention in support of its antitrust claims. In sum, the narrow focus of the court of appeals apparently reflects petitioner's own strategy and the limited evidence that it proffered in support of its own theories.[9]

2. Contrary to petitioner's contention (Pet. 18), the court of appeals did not hold "that all sellers in a given industry may pool their wares, have a committee of their members jointly sell requirements contracts to the pooled commodities or rights, and have that committee set the price of such contracts to each buyer." Rather, the court of appeals emphasized the unique nature of the market for musical compositions and petitioner's failure of proof, and it limited its opinion to the particular record before it (Pet. App. A-6 to A-8 & n.6, A-12, A-15 to A-19). See also *id.* at D-4 (court of appeals' first opinion described the music industry as "*sui generis*"). Indeed, the court of appeals expressly noted that its decision did not address the legality of the use of respondents' licensing scheme in other markets (*id.* at A-8 n.6),[10] and did not foreclose future challenges to the blanket

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[9]Petitioner argues (Pet. 22-27) that the court of appeals ignored or discounted certain evidence. But this Court ordinarily does not review the concurrent factual findings of the lower courts. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

[10]Such cases are now pending in the district court. See *Alton Rainbow Corp.* v. *ASCAP*, No. 78 Civ. 352 (S.D.N.Y.); *Buffalo Broadcasting Co.* v. *ASCAP*, No. 78 Civ. 5670 (S.D.N.Y.).

license in this market, should it prove to be a barrier to direct licensing (*id.* at A-17 to A-19).[11]

Similarly, we cannot agree with petitioner's suggestion (Pet. 18-24) that the court of appeals has established a general rule that an otherwise unlawful agreement becomes lawful if the parties to the agreement retain a right of independent action. To be sure, the court of appeals repeatedly noted (Pet. App. A-11 to A-14) that petitioner had made no attempt to purchase licenses directly from copyright owners, who retained a right to deal independently with any potential licensee. But the court further recognized that "[a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition" (*id.* at A-12).[12] Moreover, as this Court explained in its prior decision in this case (*id.* at C-20 to C-23), respondents' licensing scheme is not a *per se* violation of the antitrust laws because the product offered by ASCAP and BMI is distinct from the product potentially offered by individual copyright owners and extends otherwise unavailable marketing advantages to both copyright owners and licensees. Nothing in the decision of the court of appeals suggests

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[11]The consent decrees that govern the activities of ASCAP and BMI do not insulate them from future antitrust challenges. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 690 (1961). As this Court pointed out in its prior decision in this case (Pet. App. C-12), the government and the judiciary "stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices."

[12]The court of appeals observed (Pet. App. A-10 to A-11, A-13) that petitioner's failure to seek direct licenses may be evidence that petitioner was not harmed by the blanket license, but rather preferred it. In the court's view, petitioner failed to present any evidence showing that significant barriers existed that would prevent it from seeking alternative arrangements. Such proof would have satisfied the evidentiary deficiency found by the court of appeals and would have required that respondents' licensing scheme be evaluated further under the rule of reason.

that a right of independent action would save typical price-fixing or other agreements that previously have been subject to challenge as *per se* violations.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13]The parties to every horizontal price-fixing agreement retain a "right" of independent action simply because the unlawful agreement is unenforceable. That right of independent action does not validate the agreement. Indeed, the agreement (or any conspiracy to fix prices) itself is a crime, even if the parties exercise a right of independent action and the agreement is never effectuated. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Of course, if the court of appeals intended to establish a rule of general applicability on this point, its decision would be clearly wrong and appropriately subject to summary reversal. We do not, however, read the decision as having relevance to cases traditionally subject to the *per se* rule, or, indeed, as having relevance outside of the factual setting of this "*sui generis*" case.